STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Sawyer, P.J., and Beckering and Boonstra, JJ

NL VENTURES VI FARMINGTON, LLC,
Plaintiff-Appellant/Cross-Appellee,

v

CITY OF LIVONIA,
Defendant-Appellee/Cross-Appellant.
_____/

SC: 153110
COA: 323144
Wayne CC: 13-004863-CZ

PLAINTIFF-APPELLANT NL VENTURES VI FARMINGTON, LLC'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

HONIGMAN MILLER SCHWARTZ AND COHN LLP

By: /s/ Robert M. Riley
Mark A. Stern (P36812)
Robert M. Riley (P72290)
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226
Tel: (313) 465-7572
rriley@honigman.com
Counsel for Plaintiff-Appellant
NL Ventures VI Farmington, LLC

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

CASES

STATUTES

ORDINANCES

QUESTIONS PRESENTED FOR REVIEW

On February 1, 2017, the Court ordered the parties to file supplemental briefs addressing two questions:

1. Whether 1939 PA 178, MCL 123.161 *et seq*., MCL 141.121(3), or any other statute authorized the method by which defendant sought to enforce collection of the disputed liens?

   NL Ventures answers: No.
   City of Livonia answers: Yes.
   Court of Appeals answered: Yes.

2. If there was statutory authority for the method by which defendant sought to enforce collection of the disputed liens, whether defendant is prohibited from collecting the disputed liens because defendant failed to place them on the tax roll each year as required by Livonia Ordinance, § 13.08.350?

   NL Ventures answers: Yes.
   City of Livonia answers: No.
   Court of Appeals answered: No.

I. INTRODUCTION

This is a textbook case of statutory interpretation in which the Court of Appeals erroneously held that the word "shall" means one thing as applied to Defendant-Appellee the City of Livonia (the "City"), and an entirely different thing as applied to Plaintiff-Appellant NL Ventures VI Farmington, LLC ("NL Ventures"). The litigation involves the City's unlawful attempt to place unpaid water charges incurred by a third-party lessee on NL Ventures' property tax roll pursuant to Livonia Ordinance, § 13.08.350. That ordinance requires timely certification of delinquent water charges and entry of those charges on the tax roll at a certain time each year to enforce a water lien. But the City admittedly failed to follow the ordinance's requirements—requirements made explicit through Livonia City Council's repeated use of the word "shall"—before entering the charges on the tax roll. The Circuit Court recognized the City's overstep, ruled that its failure to follow the ordinance precluded enforcement of the liens, and granted summary disposition in favor of NL Ventures.

The Court of Appeals vacated the Circuit Court's ruling and remanded the case for entry of judgment in favor of the City. In doing so, the Court of Appeals obliterated the meaning of the word "shall" and erroneously held that the ordinance "implies a level of discretion." The Court of Appeals' flawed analysis is contrary to decades-old principles of statutory interpretation and effectively rewrites unambiguous language in contravention of Livonia City Council's intent. Equally troubling, the Court of Appeals contradicted itself by interpreting the word "shall" in another statute to mean that statute's requirements were in fact mandatory. These incongruous interpretations cannot be reconciled. The word "shall" appears in countless statutes, ordinances, and regulations; it should mean the same thing no matter its context and no matter the party which stands to gain from its application.

The Court should grant NL Ventures' application for leave to appeal, vacate the Court of Appeals' judgment, and reinstate the Circuit Court's grant of summary disposition in favor of NL Ventures.

II. FACTUAL BACKGROUND[1]

A. The Property

The subject property is an industrial building located at 12301 Farmington Road in the City of Livonia. (Affidavit of Michael Baucus, ¶ 3 (Appx 15, p 182a).) From 2009 to 2012, NL Ventures leased the entire property to Awrey Bakery, LLC ("Awrey"). (*Id*. at ¶ 4.) Awrey operated a large bakery production facility at the property. (*Id*. at ¶ 5.) Pursuant to the lease, Awrey was required to pay all water charges incurred on the property. (*Id*. at ¶ 4, *see also* Lease at § 5.02(a) (Appx 7, p 83a).)

B. The Unpaid Water Bills

In 2009, and unbeknownst to NL Ventures, Awrey stopped paying its water bills. Until approximately spring 2012, NL Ventures believed that Awrey was timely paying the City the monthly water charges because, among other reasons, the yearly tax bills the City issued to NL Ventures did not identify any unpaid water charges. (*Id*. at ¶ 8 (Appx 15, p 183a).) It also is undisputed that, had NL Ventures known in 2009 that Awrey was not paying its water bills, NL Ventures would have taken steps to ensure payment and stop further charges from accruing including, if necessary, by evicting Awrey from the property. (*Id*. at ¶ 10.)

[1] This section largely repeats the factual background set forth in NL Ventures' Application for Leave to Appeal. (*See* Application for Leave to Appeal, pp 4-14.)

C. The City Entered Into Secret Agreements with Awrey Regarding the Unpaid Water Bills

Pursuant to MCL 123.166 and Livonia Ordinance, § 13.08.350, the City should have immediately taken steps to collect on the unpaid water charges by (1) filing a collection action against Awrey; (2) shutting off and discontinuing the water supply to Awrey; (3) timely certifying in March of each year the unpaid water charges; and (4) timely entering those delinquent charges on the property's tax roll. If the unpaid water charges had been timely entered on the tax roll each year, then NL Ventures would have received notice of the unpaid water charges on its yearly tax bills and could have interceded to resolve this problem.

But the City did not pursue any of its legal remedies or follow its ordinance. Instead, the City intentionally and knowingly did not notify NL Ventures of the unpaid water charges. The City did not seek to enforce its rights because it did not want to take negative action against Awrey that could have caused Awrey further financial difficulty. In addition to Awrey being one of the City's largest employers, the City received significant direct and indirect financial benefits as a result of Awrey remaining in business, even if Awrey was not paying its water bills:

> The City has delayed ongoing penalties and interest in recognition of the investment of Awrey in our community and the potential loss of jobs. According to the company, the Livonia plant employs 225 people, with the opportunity to create 150 new manufacturing jobs when operating at full capacity. Awrey indicates its payroll and benefits total $10 million, with annual purchases of $20 million and gross sales of $70 million.
>
> As a result of Awrey's long history in Livonia as an employer and because of your forecast of significant revenue growth, the City of Livonia is willing [to] enter into this agreement.

(January 20, 2012 Letter of Understanding, at 2 (Appx 10, p 165a).)

The City's decision to extend Awrey credit and not pursue Awrey for the unpaid water charges, as well as its decision to not timely certify and enter those charges on the tax roll, were

made solely by the City. The City never consulted NL Ventures in connection with those decisions.

Unbeknownst to NL Ventures, the City and Awrey entered into several secret agreements designed to delay Awrey's payment of the delinquent water charges and continue to use the City's water without timely paying for it. For example, in September 2011, the City's Water and Sewer Board granted Awrey a one-year extension to pay its delinquent bills without new penalties. (Extension Agreement, Appx 9, p 158a.) Similarly, on January 20, 2012, the City and Awrey entered into the Letter of Understanding which set forth an agreement to meet and develop a long-term debt retirement plan. (Appx 10, p 164a.)

Critically, on February 10, 2011, the City, Awrey, and Awrey's lender entered into a Subordination Agreement which, among other things, subordinated all of Awrey's debt to the City (including the unpaid water charges) to Awrey's lender's liens on Awrey's personal property. (Appx 8, p 147a.) Awrey's lender required that the City execute the Subordination Agreement before it would extend Awrey further credit or forbear from enforcing its other loan documents with Awrey, under which Awrey was delinquent. As Awrey's Chief Restructuring Officer wrote to the City regarding the City's later attempts to recover the unpaid water charges from Awrey:

> I have reviewed your letter dated August 13, 2012 to Awrey's CEO, Robert Wallace, outlining ***certain collection, remedial, and other actions the City of Livonia (the "City") has threatened to take against Awrey relating to amounts allegedly owed on account of past water and sewer bills*** and personal property taxes. I have also reviewed this matter with counsel to Awrey and forwarded your August 13 letter to Awrey's senior lender, Cole Taylor Bank ("Cole Taylor") (which I have also copied on this correspondence).
>
> As you also know, the City entered into that certain Subordination Agreement, dated as of February 10, 2011, by and among the City, Awrey, and Cold Taylor (the "Subordination Agreement."). ***That***

> ***Subordination Agreement specifically prohibits the current and threatened future actions of the City reflected in your August 13 letter, including the restriction on the City taking "Enforcement Actions," as set forth in Section 2.3 of the Subordination Agreement.***

(Sept 19, 2012 letter (Appx 12, p 172a) (emphasis added).) The City's mayor admitted that it executed these agreements to keep Awrey in business because of the financial benefits to the City. (*See* June 15, 2012 letter (Appx 11, p 169a).) Awrey's President and CEO likewise acknowledged the financial benefits to the City.[2] (February 20, 2013 email (Appx 14, p 179a).)

Meanwhile, NL Ventures was neither involved with nor consulted in connection with these agreements, and only learned of them in mid-2012 when the City's agreements with Awrey failed to provide sufficient financial assistance such that Awrey could continue operating. Had NL Ventures been aware of the agreements, it would have sought to protect its interests earlier.

D. The City Files Suit against Awrey and Awrey's Lender

In summer 2012, Awrey went out of business. On September 28, 2012, the City filed a lawsuit in Wayne Circuit Court against Awrey and Awrey's lender, captioned *City of Livonia v Awrey Bakeries, LLC,* Docket No. 12-012867-CK. (Appx 5, pp 52a-58a.) There, among other things, the City sought to invalidate the very Subordination Agreement that it had voluntarily executed, claiming for the first time that the agreement was illegal. On February 18, 2013, the City, Awrey, and Awrey's lender entered into a confidential Settlement Agreement, whereby the

---

[2] Defendant incorrectly argues that the Subordination Agreement has nothing to do with this lawsuit. The Subordination Agreement evidences that the City and Awrey were engaged in secret activities to the detriment of NL Ventures. In fact, these discussion were so secret that the City later sued Awrey claiming that the Subordination Agreement was unauthorized by the City and was unlawful. In addition, by subordinating its debts to Awrey's lender, the City could no longer collect payment from Awrey for the unpaid water charges by filing a collection action. In effect, and unbeknownst to NL Ventures, the City viewed and treated NL Ventures as a guarantor of the unpaid water charges if its agreements with Awrey and Awrey's lender left the City without recourse against Awrey.

City was paid $453,000. (Appx 13, p 174a.) The City did not credit any of that payment against Awrey's delinquent water bills.

E. Awrey Files for Bankruptcy

On November 19, 2013, Awrey filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. *See In re Awrey Bakery, LLC*, Case No 13-13062-CSS (Bankr D Del, 2013). On March 21, 2014, Awrey's bankruptcy estate was closed and Awrey ceased to exist.

F. The City Unlawfully Attempts to Enforce Water Liens against NL Ventures

In addition to having the right to file a collection action for unpaid water charges, Michigan law enables municipalities to enact rules governing the enforcement of water liens. There are a number of procedural requirements that municipalities must follow, as well as express statutory limitations on their power to enforce water liens. In addition, MCL 123.162 limits the time period to enforce such liens to three years from the date a lien becomes effective. Failure to follow these requirements renders a lien unenforceable.

For the first time in December 2012, the City purported to place the water liens on the tax roll, plus penalties and interest, for total liens of more than $900,000 (the "Water Liens"). It is undisputed that the City did not follow its ordinance and did not timely certify the unpaid water charges for each year that they accrued; nor did the City follow its ordinance and timely enter the unpaid water charges on the tax roll each year.

G. This Lawsuit

In January 2013, the City issued NL Ventures a tax bill which included the Water Liens. NL Ventures timely objected to the bill, arguing that the Water Liens were unenforceable because the City failed to properly perfect the Water Liens as required by its ordinance.

On April 11, 2013, NL Ventures filed its complaint in Wayne Circuit Court commencing this lawsuit, seeking a ruling that the Water Liens are invalid and unenforceable, alleging counts for Declaratory Judgment (Count I), Estoppel/Waiver (Count II), Unjust Enrichment/Quantum Meruit (Count III), Breach of the City's Ordinance (Count IV), Tortious Interference (Count V), and Civil Conspiracy (Count VI). (Appx 6, p 60a-69a.)

H. The Circuit Court Entered Judgment in Favor of NL Ventures

Just as discovery was starting, the City filed a motion for summary disposition seeking to dismiss NL Ventures' Complaint. The Circuit Court stayed discovery and held several hearings on the City's motion over approximately nine months. Among other things, at those hearings the City never disputed that it had violated its ordinance and not properly and timely placed the Water Liens on the tax roll. (October 4, 2013 Hr'g Tr, at 6-7 (Appx 3, p 17a-18a).) The City also explicitly acknowledged that it was trying to keep Awrey in business for the benefit of its local economy. (*Id*.) As a result, and based principally on the City's admissions that it intentionally failed to comply with the ordinance in connection with the Water Liens, the Circuit Court ruled that the Water Liens are invalid and unenforceable:

> *The Circuit Court*: As a result of the City's failure to follow the ordinance and properly perfect the water liens the water liens are now invalid and unenforceable against the subject property. ***And again the City admits that it didn't follow the ordinance each year. And that somehow the City claims that the City had no obligation to follow its own ordinance, and the City's failure to do so has no effect whatsoever on the City's effort to enforce the water liens. And if this Court were to accept that argument it would render its own ordinance meaningless and a nullity***.
>
> It was clearly and plainly written that in order to perfect the water lien the City each year had to certify timely the unpaid water charges, place them on the tax roll, the City didn't do, it's unenforceable.

> In this instance the City knew that the tenant was using the water, there was no doubt about that. The City never was dealing with, from the documents here and the affidavits, with the landlord. The agreements as to the water were always with the tenant and until things went south, Awrey's out of business, and we've got close to a million dollar water bill with penalties and interest do they come knocking on the door of the landlord, surprise, here it is, it's on the March tax roll or whatever the 2012 tax roll, pay up. And by the way, we didn't follow our own ordinance.

(April 24, 2014 Hr'g Tr, at 11-12 (Appx 4, p 45a-46a) (emphasis added).) The City appealed the Circuit Court's ruling to the Court of Appeals.

I. The Court of Appeals Opinion Erroneously Reversed the Circuit Court

On December 22, 2015 the Court of Appeals issued an opinion reversing the Circuit Court. The Court of Appeals held that it was irrelevant that the City had failed to comply with its ordinance because, taken collectively, water liens are indestructible under the 1933 Revenue Bond Act, MCL 141.101, *et seq.* (the "Revenue Bond Act") and the 1939 Municipal Water Liens Act, MCL 123.161 *et seq*. (the "Water Liens Act"). *NL Ventures VI Farmington, LLC v City of Livonia*, 314 Mich App 222, 230; 886 NW2d 772 (2015).

Ignoring the plain language of the ordinance and invoking secondary statutory construction tools such as *in pari materia*, the Court of Appeals held that, despite the Legislature's use of the word "shall" in the City's ordinance, the more "reasoned and fair" result is that the ordinance's requirements are not mandatory at all, but are instead "discretionary." *Id*. at 236. Accordingly, the Court of Appeals held that the City was not obligated to comply with the ordinance based on the Water Liens Act and the Revenue Bond Act. *Id*. at 234.

The Court of Appeals nonetheless contradicted itself regarding the meaning and implication of the word "shall." Specifically, it held that, even though the City had actual knowledge that Awrey—and not NL Ventures—was the user of the water and contractually

responsible for payment, NL Ventures was not entitled to the protections granted to landlords from water charges incurred by their tenants under MCL 123.165 because, in order to invoke that statute, a landlord "shall" file an affidavit and "shall" means mandatory. *Id*. at 238-239. Since NL Ventures did not file an affidavit under MCL 123.165, the Court of Appeals concluded that NL Ventures was barred from arguing that Awrey was responsible for the unpaid water charges. *Id*. at 239.[3]

NL Ventures' application for leave to appeal to this Court ensued.

J. This Court Scheduled Oral Argument on NL Ventures' Application for Leave to Appeal and Ordered Supplemental Briefing

On February 1, 2017, the Court directed the Clerk to schedule oral argument on whether to grant NL Ventures' application and directed the parties to file supplemental briefs addressing (1) whether 1939 PA 178, MCL 123.161 *et seq*., MCL 141.121(3), or any other statute authorized the method by which the City of Livonia sought to enforce collection of the disputed liens, and (2) whether the City of Livonia is prohibited from collecting the disputed liens because defendant failed to place them on the tax roll each year as required by Livonia Ordinance, § 13.08.350.

III. STANDARD OF REVIEW

The Court reviews de novo the grant or denial of a motion for summary disposition. *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010). Questions of statutory interpretation are also reviewed de novo. *Id*.

[3] The Court of Appeals also erroneously reversed the Circuit Court's denial of the City's motion for summary disposition of NL Venture's tort and equitable claims (Counts II-VI). The Court of Appeals concluded that, even though discovery had not been completed, including taking the depositions of the City's representatives, those claims were not viable. *Id*. at 240-244.

IV. ARGUMENT

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Id.* at 76, citing *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 780 NW2d 753 (1999). "The first step is to review the language of the statute." *Id.* "If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute." *Id.* When determining the Legislature's intent, courts "must give meaning to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of the statute." *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016). "The rules governing the construction of statutes apply with equal force to the interpretation of municipal ordinances." *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998).

A. There Exists No Authority, Statutory or Otherwise, Authorizing the Method by which the City Sought to Enforce Collection of the Disputed Liens

The City attempted to enforce collection of the Water Liens by placing the delinquent charges on the property's tax roll without complying with the ordinance, and then seeking foreclosure for unpaid taxes.[4] Neither the Revenue Bond Act, the Water Liens Act, nor any other authority permitted the City's actions. Accordingly, the Court should reverse the Court of Appeals' judgment and reinstate the Circuit Court's judgment in favor of NL Ventures.

1. The Revenue Bond Act

The Revenue Bond Act is the first (in time) of the three statutes controlling the method by which the City could seek to enforce the Water Liens. Generally speaking, the Revenue Bond Act sets forth the statutory basis for municipalities to raise revenue through the issuance of bonds

[4] After the Court of Appeals issued its opinion, the property was placed on the foreclosure list, leaving NL Ventures with no alternative but to pay the Water Liens under protest.

for public services such as water, sewage disposal, or storm water disposal, as well as the process by which rates for those services are set.

Two provisions of the Revenue Bond Act potentially apply to this case. The first is MCL 141.118, which prohibits municipalities from providing water service without charge: "free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality." MCL 141.118(1). The City being unable to collect the water charges from Awrey in no way constitutes the City providing free water service to Awrey, much less to NL Ventures. Nor is being unable to enforce the Water Liens against NL Ventures the same as providing free services.

The second provision is MCL 141.121(3), which provides the method by which charges for water service furnished by a municipality may become a lien on property:

> Charges for services furnished to a premises ***may be a lien on the premises***, and those charges delinquent for 6 months or more may be certified annually to the proper tax assessing officer or agency who shall enter the lien on the next tax roll against the premises to which the services shall have been rendered, and the charges shall be collected and the lien shall be enforced in the same manner as provided for the collection of taxes assessed upon the roll and the enforcement of the lien for the taxes. ***The time and manner of certification and other details in respect to the collection of the charges and the enforcement of the lien shall be prescribed by the ordinance adopted by the governing body of the public corporation***.

MCL 141.121(3) (emphasis added).

By its plain terms, MCL 141.121(3) itself does not provide any method for enforcing liens for water charges. Instead, it ***mandates***—through the use of the word "shall"—that municipalities enact an ordinance governing "the time and manner of certification and other details in respect to the collection of the charges and the enforcement of the lien." Accordingly,

the Revenue Bond Act standing alone does not authorize the method by which the City attempted to enforce the Water Liens.[5]

2. The Water Liens Act

Building on the Revenue Bond Act, the Water Liens Act grants municipalities cumulative and slightly broader lien enforcement rights. The purpose of the Water Liens Act is "to provide for the collection of water or sewage system rates, assessments, charges, or rentals; and to provide a lien for water or sewage system services furnished by municipalities as defined by this act." There are several provisions of that act applicable here. The first is MCL 123.162, which affirmatively and automatically grants a municipality a lien against property to which it provides water service and imposes a three-year enforcement limitation:

> ***A municipality*** which has operated or operates a water distribution system or a sewage system for the purpose of supplying water or sewage system services to the inhabitants of the municipality, ***shall have*** as security for the collection of water or sewage system rates, or any assessments, charges, or rentals due or to become due, respectively, for the use of sewage system services or for the use or consumption of water supplied to any house or other building or any premises, lot or lots, or parcel or parcels of land, ***a lien upon the house or other building and upon the premises, lot or lots, or parcel or parcels of land upon which the house or other building is situated or to which the sewage system service or water was supplied***. ***This lien shall become effective immediately upon the distribution of the water*** or provision of the sewage system service to the premises or property supplied, ***but shall not be enforceable for more than 3 years after it becomes effective***.

---

[5] The Court of Appeals cited MCL 141.108 for the proposition that the Revenue Bond Act "creates a lien ***for the benefit of bondholders***." *NL Ventures*, 314 Mich App at 231-232 (emphasis added). This statute is entirely irrelevant to this case. The lien created by MCL 141.108 is a lien "upon the net revenues pledged to the payment of the principal of and interest upon [] bonds" issued by a municipality. In other words, it grants bondholders a lien on the monies received by a municipality for services the municipality provides; the statute does not grant the municipality a lien against the properties to which it provides those services. To the extent the Court of Appeals conflated the Revenue Bond Act's lien in favor of a bondholder with a lien in favor of a municipality, it clearly erred.

MCL 123.162 (emphasis added). Accordingly, from the moment water is provided to a property, the municipality is granted a lien, which it can enforce for up to three years after it becomes effective.

MCL 123.163 sets forth how the lien created by MCL 123.162 may be enforced:

> The lien created by this act may be enforced by a municipality in the manner prescribed in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, or by an ordinance duly passed by the governing body of the municipality.

In other words, there are three methods by which a municipality may enforce a lien that arises under the Water Lien Act: (i) in the manner prescribed in the charter of the municipality; (ii) by the general laws of the state governing enforcement of tax liens; or (iii) by an ordinance passed by the municipality. Here, it is undisputed that the City does not have a lien enforcement mechanism prescribed in its charter. Further, as discussed below, the City did not comply with its ordinance in its attempt to collect the Water Liens. That leaves only the general laws of the state providing for the enforcement of tax liens as a possible collection method.

The collection method undertaken by the City involved the General Property Tax Act, MCL 211.1 *et seq*. (the "GPTA"). Among other things, the GPTA governs the enforcement of tax liens on real and personal property and provides the processes and procedures for collection of delinquent taxes. But the GPTA only provides processes and procedures for collecting taxes which have been properly entered on the tax roll; it does not provide any process or procedures for how charges are entered on the tax roll in the first instance. In other words, the GPTA does not govern the outcome of this case because it does not provide a method by which the Water Liens were or could have been entered on the property's tax roll such that they could later be

collected under the GPTA.[6] That is because the Legislature left it to local municipalities to establish their own process for delinquent water charge collection. Indeed, if the Legislature had enacted a statute controlling how unpaid water bills are added to the tax roll, there would be no need for municipalities to enact ordinances like Livonia Ordinance, § 13.08.350.

Because neither the Water Liens Act nor the GPTA provides a mechanism for entering delinquent water charges on the tax roll, neither authorized the method by which the City sought to collect the Water Liens.[7]

3. Livonia Ordinance, § 13.08.350

The final and most important legislative enactment at issue in this case is Livonia Ordinance, § 13.08.350, which sets forth specific steps the City must follow to enforce a water lien:

> Charges for water service constitute a lien on the property served, and during March of each year the person or agency charged with the management of the system ***shall*** certify any such charges which as of March 1st of that year have been delinquent six (6) months or more to the city assessor, who ***shall*** enter the same upon the city tax roll of that year against the premises to which such service ***shall*** have been rendered; and said charges ***shall*** be collected and said lien ***shall*** be enforced in the same manner as provided in respect to taxes assessed upon such roll.

Livonia Ordinance, § 13.08.350 (emphasis added). Parsing this ordinance clause by clause, several critical points emerge.

---

[6] The word "water" appears 58 times in the GPTA. Not a single one of the statutes containing the word "water" addresses water liens or their enforcement.

[7] Even if there were another statute providing a method by which the City could have sought to enforce the Water Liens, that statute would be inapplicable to this case because the City did not seek enforcement under that statute within three years as required by MCL 123.162 since the Water Liens arose between 2009 and 2012.

The ordinance's initial clause recognizes that the City has a lien for water provided to property. This is merely a restatement of MCL 123.162, which expressly grants a municipality a lien upon the premises to which water was supplied.

The second clause sets forth three enforcement prerequisites. First, to enforce a lien, water bills ***must*** be delinquent for six months or more as of March 1 of a given year. *Id*. Second, the City ***must*** certify those delinquent charges to the city assessor. *Id*. Third, that certification ***must*** take place during March of the given year. *Id*.

The third clause sets forth yet two more enforcement prerequisites: the city assessor ***must*** enter the certification of delinquent water bills upon the tax roll of "***that year***" against the subject property. *Id*.

The final clause limits the manner in which the delinquent charges shall be collected: they ***must*** be collected "in the same manner as provided in respect to taxes assessed upon such roll." *Id*.

In sum, the plain language of the ordinance requires for enforcement of a water lien:

(1) Six months or more of delinquent charges as of March 1 of a given year;

(2) Certification of the delinquent charges by the person or agency charged with the management of the system to the city assessor;

(3) The certification takes place during March of the given year;

(4) Entry of the delinquent charges for the given year on the subject property's tax roll; and

(5) Collection in the same manner as property taxes assessed upon the tax roll.

Each of these requirements is mandatory through the ordinance's repeated use of the word "shall;" the ordinance affords no discretion to the City.[8]

The word "shall" is used is countless statutes. Its use by the Legislature and other rule-making bodies is meant to convey a mandatory requirement that must be followed. *See, e.g.*, *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 65; 42 NW2d 663 (2002) ("the phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action"); *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014) (the word "shall" indicates "a mandatory and imperative directive"); *Smitter v Thornapple Twp*, 494 Mich 121, 137; 833 NW2d 875 (2013) ("The Legislature's use of the word 'shall' generally indicates a mandatory directive, not a discretionary act."). Here, the City did not simply overlook the ordinance's mandatory requirements to enforcement of the Water Liens. Instead, it is undisputed that the City ***intentionally disregarded*** the ordinance by failing to timely certify during March of each year the delinquent charges and enter those charges on the tax roll. Accordingly, the Circuit Court correctly applied the unambiguous language of the ordinance and ruled that the Water Liens are unenforceable.

The Court of Appeals inexplicably rejected courts' longstanding interpretation and application of the word "shall" in analyzing the impact of the ordinance, and in doing so ignored

---

[8] Take for example "Delinquent Dan," a City of Livonia property owner who fails to pay his water bills for May, June, and July of 2017. Under MCL 123.162, the City is automatically and immediately granted liens on Delinquent Dan's property in the amounts of those unpaid bills. Delinquent Dan's bills remain unpaid for six months as of March 1, 2018. For the City to enforce its liens under its ordinance, in March 2018, the person or agency charged with the management of the system must certify those delinquent charges to the city assessor. The city assessor must then enter those delinquent charges on the subject property's tax roll for 2018. The ordinance affords the City no discretion to delay enforcement beyond March 2018. Nor does it permit the City to enter delinquent charges on a subsequent year's tax roll. That way, Delinquent Dan is on notice that the water liens on his property have been entered on the tax roll (which could lead to foreclosure if the property's tax bill remains unpaid).

the best evidence of the Livonia City Council's intent in drafting lien enforcement procedures. Making matters worse, in construing the mandate of the ordinance, the Court of Appeals held that strict compliance was not required because the ordinance "implies that a municipality has a level of discretion in the certification of delinquencies because the ordinance does not require immediate certification of a delinquency of six months . . . ." *NL Ventures*, 314 Mich App at 234. The Court of Appeals' opinion belies a straightforward reading of the ordinance.

In sum, neither the Revenue Bond Act, the Water Liens Act, the GPTA, the Livonia ordinance, nor any other authority authorizes the method by which the City sought to enforce collection of the Water Liens. The Court should reverse the judgment of the Court of Appeals.

B. The City of Livonia Is Prohibited from Collecting the Disputed Liens because it Failed to Place Them on the Tax Roll Each Year As Required by Livonia Ordinance, § 13.08.350

1. The Water Liens cannot be enforced because the City intentionally failed to follow its ordinance

As discussed above, the Water Liens cannot be enforced because the City did not comply with its ordinance. On its face, the ordinance mandates that the City "***shall***" certify by March each year the unpaid water charges and "***shall***" timely place them on the tax roll, which if done properly would result in those unpaid charges being entered each year on the property owner's tax bill. Livonia Ordinance, § 13.08.350 (emphasis added). The word "shall" is used not once, but five times. Each of those words must be given full effect. *Jesperson*, 499 Mich at 34 (courts "must give meaning to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of the statute").

The reason the ordinance mandates this yearly certification and timely placement by the City on the tax roll is to prevent exactly what happened in this case—i.e. the accrual of years' worth of unpaid water bills without the property owner's knowledge. By enacting an ordinance

requiring that the City yearly certify and enter delinquent water charges on the tax roll, property owners are given notice of any delinquencies because those charges appear on the property's summer tax bill. As a result, the property owner can take various steps necessary to protect itself from the possibility of foreclosure. The Circuit Court recognized this principle, as well as the mandatory nature of the ordinance:

> *The Circuit Court*: I don't think the City has contested that that procedure was not followed both to the letter, nor to the spirit.
>
> I didn't write the ordinance, the ordinance said shall, shall means shall, must, mandatory. And if we want to get into the policy reason behind it it's to prevent exactly what happened here, to prevent the accruing of years and hundreds and tens and hundreds and thousands of dollars worth of unpaid water bills without the property owner's knowledge.

(April 24, 2014 Hr'g Tr, at 10 (Appx 4, p 44a).)

More troubling, the City intentionally violated the ordinance and failed to timely certify the unpaid water charges on the tax roll each year. This was not an inadvertent mistake by the City, nor is this appeal NL Ventures' attempt to point out some hyper-technical violation of the ordinance as suggested by the Court of Appeals. To the contrary, the City deliberately did not certify the unpaid water charges and enter them on the tax roll because the City concluded that it was in its best interest not to do so in order to keep Awrey in business. Further, the City did not want NL Ventures to evict Awrey because Awrey was one of the City's largest employers. In other words, the City took affirmative steps to not comply with the ordinance notwithstanding its unambiguous mandate that it timely certify and enter on the tax roll any unpaid water charges. The City's failure to do so precludes enforcement of the Water Liens.

It is well established that the failure to properly perfect a lien results in an otherwise valid lien being rendered invalid and unenforceable. *See, e.g., Northern Concrete Pipe, Inc v*

Sinacola, 461 Mich 316; 603 NW2d 257 (1999) (lien invalidated where lien holder failed to comply with 90-day filing time limit); *Jenks v Daniel*, 304 Mich 239; 7 NW2d 286 (1943) (material and labor lien invalidated because it was not made in good faith); *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002) (construction lien rendered invalid because the plaintiff was not licensed); *In re Dean Monagin, Inc*, 18 Mich App 171; 170 NW2d 924 (1969) (lien invalidated because it was not properly and timely perfected); *Stock Bldg Supply, LLC v Parsley Homes of Mazucheat Harbor, LLC*, 291 Mich App 403, 410; 804 NW2d 898 (2011) (lien for plumbing work invalid because it was not timely filed); *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330; 766 NW2d 30 (2008) (the plaintiff could not recover on lien against the Homeowner Construction Lien Recovery Fund because it did not file a timely claim); *Vorrath v Garrelts*, 49 Mich App 142, 145, 147; 211 NW2d 536 (1973) (failure to comply with lien statute and file a sworn statement can prevent the attachment of an otherwise valid lien: "A lien is something apart from the cause of action and destruction of a lien has no effect on the underlying cause of action except to render it at least partially unenforceable if the defendant is insolvent") (citation omitted).

Here, the Circuit Court correctly recognized that, like any other untimely and improperly perfected lien, the Water Liens are not enforceable because it is undisputed that they were not properly perfected under the ordinance and entered on the tax roll. Yet the Court of Appeals granted the City special treatment by exempting it from the mandatory requirements of its ordinance. This type of results-driven decision making is exactly what courts are not permitted to do. *See, e.g.*, *Roberts*, 466 Mich at 66 ("The role of the judiciary is not to engage in legislation.") (internal citation omitted); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312;

645 NW2d 34 (2002) ("Because the proper role of the judiciary is to interpret and not write the law, courts simply lack the authority to venture beyond the unambiguous text of a statute.").

The City must be held to the same legal standard as NL Ventures and every other taxpayer—nothing more, nothing less. As courts have recognized on numerous occasions, a taxpayer's failure to follow mandatory statutory requirements can bar a taxpayer from obtaining relief to which it would otherwise be entitled. For example, in *Packaging Corp of America v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2014 (Docket No 317708) (Appx 20, p 198a), the Court denied a tax credit to the plaintiff to which it was otherwise entitled because the governing statute states that the taxpayer "***shall***" complete and deliver a personal property statement by a specific date. Because the plaintiff failed to do so, it was barred from relief.

Like the taxpayer in *Packaging Corp*, the City's failure to follow the mandatory requirements of its ordinances precludes it from enforcing the Water Liens. *See also Creative Industries Group, Inc v Dep't of Treasury*, 187 Mich App 270; 466 NW2d 311 (1990) (upholding denial of application for exemption certificate because taxpayer filed application more than six months after construction of the property commenced in violation of statute); *Walgreen Co v Macomb Twp*, 280 Mich App 58, 64-65; 760 NW2d 594 (2008) (holding that lessee who does not present written authorization from lessor may not protest its tax assessments at the board of review even though the lessee was a party-in-interest and responsible for paying taxes). The rule established by these cases—that taxpayers are not entitled to flout statutes' mandatory requirements—applies with equal force to the City. Because the City failed to follow its ordinance, the Water Liens are unenforceable.

2. The City could have adopted an ordinance that did not require it to annually certify delinquent water charges on the tax roll

In both the Revenue Bond Act and Water Liens Act, the Legislature explicitly delegated to local municipalities the task of drafting laws governing the time and manner of water lien enforcement. In fact, the Revenue Bond Act expressly mandates that municipalities enact a method for lien enforcement because the act itself does not contain an enforcement mechanism:

> The time and manner of certification and other details in respect to the collection of the charges and the enforcement of the lien ***shall be prescribed by the ordinance adopted by the governing body of the public corporation***.

MCL 141.121(3) (emphasis added). Similarly, the Water Liens Act provides multiple avenues by which a municipality may enact its own lien enforcement rules:

> The lien created by this act ***may be enforced by a municipality in the manner prescribed in the charter of the municipality***, by the general laws of the state providing for the enforcement of tax liens, ***or by an ordinance duly passed by the governing body of the municipality***.

MCL 123.163 (emphasis added). The manner in which a municipality enforces water liens is entirely within the municipality's control.

While the City of Livonia enacted an ordinance that contains mandatory prerequisites to water lien enforcement, other municipalities have enacted different rules without such requirements.

a. City of Ann Arbor

The City of Ann Arbor enacted an ordinance requiring its Chief Financial Officer to report from time to time to the City Council a list of all unpaid water charges that have been delinquent for six months. The City Council then makes an assessment of how much is due and owing and assesses that amount as a tax and places it on the subject property's tax roll. Ann Arbor Code of Ordinances, § 2.72 (Appx 16, p 185a).

b. City of Kalamazoo

Kalamazoo's ordinance provides that its Treasurer may, at his or her discretion, certify to the tax assessor at any time an unpaid water bill that has been delinquent for more than six months. The tax assessor must then place the assessment on the subject property's next tax roll. City of Kalamazoo Charter and General Ordinances, § 159.004IV(D) (Appx 17, p 187a).

c. Traverse City

Traverse City enacted an ordinance requiring that all unpaid water bills which, upon April 1 of each year, remain unpaid for three or more months, shall be reported by the City Manager to the City Commission in the first meeting in April. The City Commission must then order that the notice of the unpaid water bill be published in a newspaper. If the amount remains unpaid by April 30 of that year, then the amount shall be transferred to Traverse City's tax roll and assessed against the property on which the water was used. That assessment is collected in the same manner as a lien created by Traverse City's tax roll. Traverse City General Ordinances, § 1044.17(d) (Appx 18, p 190a-191a).

d. City of Detroit

The City of Detroit has no specific authority in its ordinances that allows the City to place a water lien on a subject property's tax roll. Rather, the City of Detroit enacted an entirely different and expedited collection process under which the City of Detroit, through its Board of Water Commissioners, is permitted to enforce a water lien at any time by selling the real property at public auction after certain required notices. City of Detroit Ordinances, § 56-2-44 (Appx 19, p 195a).

e. The City of Livonia could have enacted an ordinance without mandatory requirements

The City of Livonia could have enacted an ordinance providing it with more flexibility in the manner, timing, and method by which it enforces water liens. If the City had a different ordinance, it is certainly plausible that the outcome of this case would be different. But the City chose to enact the ordinance on its books; that ordinance contains specific, unambiguous, and mandatory requirements which the City "***shall***" follow to enforce a water lien. Perhaps the City's residents, through their City Council representatives, demanded enhanced protections against enforcement of water liens. Perhaps the City reviewed other jurisdictions' ordinances and preferred a rule imposing mandatory requirements that did not vest discretion in the City's leaders. Whatever the City's motivations were, the language of its ordinance is clear. The City's failure to follow its ordinance in this case is fatal to its attempt to enforce the Water Liens.

3. NL Ventures' failure to file an affidavit pursuant to MCL 123.165 is irrelevant to whether the City must follow its ordinance

Notwithstanding the City's failure to follow the mandatory language of its ordinance, the Court of Appeals held that NL Ventures was not entitled to relief because it failed to file an affidavit under MCL 123.165. *NL Ventures*, 314 Mich App at 238-239. That statute provides a method for a property owner to avoid liability for a tenant's water arrearage accrual:

> [The Municipal Water Liens] act shall not apply if a lease has been legally executed, containing a provision that the lessor shall not be liable for payment of water or sewage system bills accruing subsequent to the filing of the affidavit provided by this section. ***An affidavit with respect to the execution of a lease containing this provision shall be filed*** with the board, commission, or other official in charge of the water works system or sewage system, or both, and 20 days' notice shall be given by the lessor of any cancellation, change in, or termination of the lease. The affidavit shall contain a notation of the expiration date of the lease.

MCL 123.165 (emphasis added). The purpose of this statute is to prevent municipalities from placing liens for unpaid water on a landlord's property when the municipality knows that the tenant is responsible for payment.

Here, NL Ventures' failure to file an affidavit is irrelevant. At most, all it could mean is that the Water Liens Act does apply. But that act does not authorize the City's method for attempting to enforce the Water Liens. Moreover, NL Ventures' failure to file an affidavit does not excuse the City's obligation to follow the multiple mandates in its ordinance, nor does it in any manner change the legal status of Water Liens or their enforceability. Regardless of whether NL Ventures filed an affidavit, the Water Liens cannot be enforced unless the City followed its ordinance and timely certified each year the unpaid water charges and entered them on the tax roll. The City admits that it did not follow the ordinance and therefore the Water Liens cannot be enforced. MCL 123.165 is irrelevant.

4. Tax Laws Must Be Construed in Favor of Taxpayers

"State legislatures have great discretionary latitude in formulating taxes. The legislature must determine all question[s] of State necessity, discretion or policy in ordering a tax and in apportioning it. And the judicial tribunals of the State have no concern with the policy of State taxation determined by the legislature." *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 472; 838 NW2d 736 (2013). "When interpreting a tax statute, the power to tax must be expressly stated, not inferred." *Id.*, citing *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994). "Tax laws will not be extended in scope by implication or forced construction." *Id.* at 472-473. "It is fundamental that doubtful language, if present in a taxing statute, is not resolved against the taxpayer and that ***tax laws are to be construed liberally in favor of the taxpayer***." *Ready-Power Co v City of Dearborn*, 336 Mich 519; 58 NW2d 904 (1953) (emphasis added), citing *Sidley Lumber Co v Dep't of Revenue*, 311 Mich 654, 660; 19

NW2d 132 (1945). Appellate courts "may not vary the clear and unequivocal meaning of the words used in the statute and determine tax matters solely on the grounds of unwisdom or of public policy." *Menard*, 302 Mich App at 474.

There is no authority that vests the City with discretion as to the manner in which the City can certify delinquent water charges and enter those charges on the tax roll. To the extent there exists any lingering question about the interpretation and application of the Revenue Bond Act, the Water Lien Act, the GPTA, or Livonia Ordinance, § 13.08.350, how those statutes work together, or the import of the ordinance's repeated use of the word "shall," the law must be construed against the City and in NL Ventures' favor. *Ready-Power*, 336 Mich at 525. This is yet another independent reason to reverse the judgment of the Court of Appeals.

V. CONCLUSION

For the foregoing reasons, and the reasons set for in its application for leave to appeal, NL Ventures respectfully requests that the Court: (i) grant its application for leave to appeal; (ii) reverse the judgment of the Court of Appeals; (iii) reinstate the Wayne Circuit Court's grant of summary disposition in favor of NL Ventures on Count I of NL Ventures' Complaint; and (iv) grant such further relief to NL Ventures as the Court deems just and proper.

Dated: March 15, 2017

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

By: /s/ Robert M. Riley

Mark A. Stern (P36812)
Robert M. Riley (P72290)
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226
Tel: (313) 465-7572
rriley@honigman.com
Counsel for Plaintiff-Appellant
NL Ventures VI Farmington, LLC

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2017, I electronically filed the foregoing using the TrueFiling System which will send notification of such filing to all registered counsel of record.

Respectfully Submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

By: /s/ Robert M. Riley

Mark A. Stern (P36812)
Robert M. Riley (P72290)
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226
Tel: (313) 465-7572
rriley@honigman.com
Counsel for Plaintiff-Appellant
NL Ventures VI Farmington, LLC

Dated: March 15, 2017